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Non-adjudicatory State-State Mechanisms in Investment Dispute Prevention and Dispute Settlement: Joint Interpretations, Filters and Focal Points*

Mecanismos não contenciosos de prevenção e de resolução de disputas referentes aos investimentos entre Estados: Interpretações conjuntas, filtros e pontos focais

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Abstract

The last 30 years in the history of international investment law witnessed the emergence of investor-state dispute settlement (ISDS) as the definitive method for the resolution of investment disputes, and the expanding role of the investor in the same. Investment dispute settlement has become largely synonymous with a system that involves an investor, often private entity, in international arbitration against its host state. States, in this same setting, are relegated to the role of respondent. But despite the predominant role of the investor, some mechanisms involving both states (host state and home state of the investor) do exist. Some of these mechanisms, such as state-state dispute settlement and binding interpretations, have been used for years. Others, such as national contact points or ombudsmen, are newer. As investment law enters a new era of reflection with the functioning of the current ISDS machinery at its centre, some of the efforts at reforming international investment law focus on enhancing the role of the state in investment dispute settlement and add to the popularity of some of these mechanisms. The article critically explores three 'soft' non-adjudicatory approaches to the prevention or resolution of investment disputes that belong to the sphere of state-to-state procedures and have gained currency in recent years: joint interpretive statements, including subsequent agreement or practice under general public international law and clarifications through diplomatic notes and periodic review of treaty content; filter mechanisms; and focal points or ombudsmen.

Keywords: non-adjudicatory State-State mechanism; joint interpretations; filters; focal points

Resumo

Os últimos 30 anos na história do direito de investimento internacional testemunharam o surgimento da solução de conflito entre investidores e Estados como o método para a resolução de conflitos de investimento e o papel crescente do investidor no mesmo. A resolução de litígios de in-

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vestimento tornou-se em grande parte sinônimo de um sistema que envolve um investidor, muitas vezes entidade privada, num processo de arbitragem internacional contra o seu Estado anfitrião. Os Estados, neste mesmo cenário, são relegados ao papel do reu. Mas, apesar do papel predominante do investidor, alguns mecanismos envolvendo ambos os Estados (Estado anfitrião e Estado de origem do investidor) existem. Alguns desses mecanismos, como a resolução de litígios entre Estados e as interpretações vinculativas, foram usados há anos. Outros, como os Pontos de contato nacionais ou o Ombudsman, são mais novos. Como o direito dos investimentos entra em uma nova era de reflexão com o funcionamento do atual sistema de resolução de disputas no seu centro, alguns dos esforços de reforma internacional são visíveis, concentrando-se no papel crescente do Estado na resolução de disputa, aumentando assim a popularidade de alguns desses mecanismos. O artigo explora criticamente três abordagens 'não-contenciosas' para a prevenção ou a resolução de disputas de investimento que pertencem à esfera de procedimentos Estado-Estado que ganharam atenção nos últimos anos: as declarações interpretativas conjuntas, incluindo acordo ou prática subsequente regido pelo direito internacional público e esclarecimentos através de notas diplomáticas e revisão periódica do conteúdo dos tratados; mecanismos de filtragem; e pontos focais ou ombudsman.

Palavras-chave: resolução não contenciosa de disputas; interpretação conjunta; filtros; pontos focais

1. Introduction

The last 30 years in the history of international investment law witnessed the emergence of investor-state dispute settlement (ISDS) as the definitive method for the resolution of investment disputes, and the expanding role of the investor in the same. Investment dispute settlement has become largely synonymous with a system that involves an investor, often private entity, in international arbitration against its host state. States, in this same setting, are relegated to the role of respondent. But despite the predominant role of the investor, some mechanisms involving both states (host state and home state of the investor) do exist. Some of these mechanisms, such as state-state dispute settlement and binding interpretations, have been used for years. Others, such as national contact points or ombudsmen, are newer. As investment law enters a new era of reflection[1] with the functioning of the current ISDS machinery at its centre, some of the efforts at reforming international investment law focus on enhancing the role of the state in investment dispute settlement and add to the popularity of some of these mechanisms.

The purpose of the present article is to critically explore three of these complementary or alternative approaches to the prevention or resolution of investment disputes that belong to the sphere of state-to-state procedures and have gained currency in recent years. All three mechanisms are 'soft' non-adjudicatory means by which states parties to a treaty reserve for themselves a role in the interpretation or application of an investment treaty in investment dispute settlement or in dispute prevention. These means often require consultations between the parties, although consultations are not examined as a standalone mechanism in the present contribution. The article is structured as follows. The first part focuses on interpretive statements issued jointly by the contracting parties. These include subsequent agreement or practice under general public international law, binding interpretations provided for in the treaty text, other interpretations, and clarifications through diplomatic notes and periodic review of treaty content. The second part examines filter mechanisms. The third part turns to focal points or ombudsmen. A final section concludes.

2. Joint interpretive statements

'Masters' of their treaties,[2] the contracting parties are seen as the treaties' 'authoritative' interpreters or at least as capable of providing 'authentic' means of interpretation. This is true to some extent under general public international law and under certain investment treaty provisions that expressly allow the contracting parties to assume a concrete role in the interpretation of their treaties. Four of these mechanisms will be explored here: subsequent agreement or practice under general public international law, binding interpretive statements on the basis of treaty provisions, other interpretive statements not expressly provided for by the applicable investment

1 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 2015, New York and Geneva, UN, p. 120.

2 UNCTAD, *IIA Issues Note No. 3: Interpretation of IIAs: What States Can Do*, 2011, p. 4.

treaty as such, and clarifications through diplomatic notes and periodic review of treaty content.

2.1. Subsequent agreement or practice under general public international law

Under certain conditions, states can give authoritative interpretations of their treaties on the basis of general public international law. Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties (VCLT) provides that treaty interpretation shall take into account, together with the context '[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' and '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[3] According to the International Law Commission (ILC), 'an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation'.[4] The Report of the International Law Commission on its sixty-fifth session in 2013 established:

> 'By describing subsequent agreements and subsequent practice under article 31(3)(a) and (b) as "authentic" means of interpretation the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. The Vienna Convention thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems.'[5]

The ILC has warned that Article 31(3) of the VCLT requires that subsequent agreement and practice be taken into account, but that does not necessarily imply that these means 'possess a conclusive, or legally binding, effect'; in other words, they do not override all other means of interpretation.[6] By contrast, when 'the parties consider the interpretation to be binding upon them', subsequent agreements and practice regarding the interpretation of a treaty *must* be conclusive.[7] Such possibility for binding or conclusive effect is clear in cases, such as in Article 1131, paragraph 2, of the North American Free Trade Agreement (NAFTA), where the treaty itself provides for it.[8] Article 1131 of NAFTA will be discussed in the following section.

The contracting parties' ability to provide authoritative means of interpretation in relation to their treaties has also been addressed by the Permanent Court of International Justice (PCIJ) and by the International Court of Justice (ICJ). The PCIJ has held that '[i]t is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it'.[9] In its turn, the International Court of Justice (ICJ) has repeatedly made reference to or sought to establish the presence of the parties' subsequent agreement or practice as to the interpretation of a treaty.[10]

2.2. Binding joint interpretations on the basis of treaty provisions

Binding party interpretations on the basis of concrete investment treaty provisions, initially encountered in North American investment treaty practice but now becoming more widespread, allow for interpretive statements either by the parties or by a joint commission made up by representatives of the contracting parties that are binding on a tribunal. Probably the most famous of these provisions is Article 1131, paragraph 2, of NAFTA which has formed the basis of several joint statements by the NAFTA Free Trade Commission (FTC).[11] The most notable use of the article took place in 2001, when the NAFTA FTC issued an interpretive

3 On the distinction between 'subsequent agreement' and 'subsequent practice', see ILC, Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), UN Doc A/68/10 (2013), p. 21-24.

4 ILC, *Yearbook of the International Law Commission 1966*, Vol. II 221, [14], UN Doc A/CN.4/SER.A/1966/Add.l.

5 ILC, Report of the International Law Commission, Sixty-fifth session(6 May–7 June and 8 July–9 August 2013), UN Doc A/68/10 (2013), p. 21.

6 *Ibid*., p. 21.

7 *Ibid*., p. 22.

8 *Ibid*., p. 22.

9 Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina), Advisory Opinion, (1923) PCIJ Series B no 8.

10 E.g. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, p. 6, para. 66; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999, p. 1045, paras 48, 63; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, ICJ Reports 2002, p. 625, paras 37, 61; Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, ICJ Reports 2014, p. 226, para. 83; Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, 2 February 2017, para. 64.

11 See http://www.sice.oas.org/TPD/NAFTA/NAFTA_e.ASP#Understanding.

statement that equated fair and equitable treatment, as enshrined in Article 1105 of NAFTA, with the minimum standard of the treatment of aliens under customary international law.[12] This interpretation is no less notorious because when it was issued, in an ongoing dispute, the *Pope & Talbot* tribunal had already determined that 'the requirement to accord NAFTA investors fair and equitable treatment was independent of, not subsumed by the requirement to accord them treatment required by international law'. As a consequence of the FTC interpretive statement, the tribunal was required to recant.

Article 1131, paragraph 2, of NAFTA has been emulated in subsequent US and Canadian treaty practice.[13] An equivalent provision exists in the new international investment treaties of the European Union, but also in investment treaties concluded outside these regions. For instance, the EU-Singapore free trade agreement (FTA) provides:

> 'Where serious concerns arise as regards issues of interpretation which may affect matters relating to this Chapter, the Trade Committee […] may adopt interpretations of provisions of this Agreement. An interpretation adopted by the Trade Committee shall be binding on a tribunal deciding on a claim […], and any award shall be consistent with that decision. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.' [14]

Outside the EU, an example comes from the Korea--New Zealand FTA. This 2015 treaty provides that a tribunal, on the request of the respondent, shall 'request a joint interpretation of the Joint Commission of any provision of this Agreement that is in issue in a dispute'.[15] The Joint Commission shall submit to the tribunal any joint decision on the interpretation of the agreement within 60 days.[16] This joint decision will be binding on the tribunal and 'any award must be consistent with that joint decision'.[17] If the Joint Commission fails to make a decision within 60 days, the issue reverts to the tribunal for determination.[18] Similarly, Russia's recent Regulation on Entering into International Treaties on the Encouragement and Mutual Protection of Investments, which replaces the Russian Model BIT,[19] recommends that arbitration proceedings not be commenced or, if commenced, be suspended, pending consultations between the contracting parties in order to render a binding interpretation of investment treaty provisions raised in a dispute.[20] Provisions on binding interpretive statements sometimes allow a disputing party to request the tribunal to submit to the contracting parties its proposed decision or award for comments concerning any of its aspects.[21]

Binding 'interpretations' are also provided for in relation to specific measures, notably those relating to taxation and prudential measures. The relevant provisions typically apply when an exception or other defence is invoked by the host state, in which case the competent tax or financial authorities[22] or the contracting parties[23] need to determine whether the arguments of the host state constitute a valid defence. This type of procedure for binding determinations, called 'filter', could be considered as a joint interpretation mechanism. However, in contrast with joint interpretations discussed here, filters tend to concern concrete application of the law in a given situation. Filters are examined below in Section III.

2.3. Interpretive statements not expressly provided for as such in the treaty

Joint interpretations are also possible when not directly provided for in a treaty as such. The EU-Canada Comprehensive Economic and Trade Agreement (CETA) provides that a tribunal seised of a dispute shall accept or, following consultation with the disputing parties, may invite oral or written submissions from the non--disputing contracting party regarding the interpretation the agreement. Although this provision is focused on the

12 NAFTA, Free Trade Commission Clarifications Related to NAFTA Chapter 11, 31 July 2001, http://www.worldtradelaw.net/nafta/chap11interp.pdf.

13 E.g. Article 30(3) of the US Model BIT (2012) and Article 33(1) of the Canadian Model BIT (version of 2012).

14 Article 9.19(3) of the EU-Singapore free trade agreement (FTA). For another example, see Articles 8.31(3) and 26.3(2) of the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

15 Article 10.25(1) of the Korea-Nez Zealand FTA (2015).

16 Article 10.25(1) of the Korea-Nez Zealand FTA (2015).

17 Articles 10.25(2) and 10.28 (2) of the Korea-Nez Zealand FTA (2015).

18 Article 10.25(2) of the Korea-Nez Zealand FTA (2015).

19 See Foreign direct investment after Yukos Shareholders v Russia, *Norton Rose Fulbright*, http://www.nortonrosefulbright.com/knowledge/publications/148974/russias-new-guidelines-on-future-bilateral-investment-treaties.

20 See http://globalarbitrationreview.com/jurisdiction/2000149/russia.

21 Article 28(9)(a) of the US Model BIT (2012). However, in this case, the comments are not binding but need only be considered.

22 E.g. Article 2103(6) of the NAFTA; Article 21(5)(b) of the Energy Charter Treaty (ECT); Article 21(2) of the US Model BIT (2012); Article 14(7) of the Canadian Model BIT (version of 2012).

23 Article 28.7 of CETA.

non-disputing party, when applied the result is that both contracting parties will have provided their opinion on the interpretation of the treaty. CETA further provides that its Committee on Services and Investment 'shall provide a forum for the Parties to consult' on issues related to the treaty's investment chapter.[24] Properly speaking, the latter provision concerns consultations between the parties. Consultations can end up in a joint statement that a tribunal takes into account.

Such an example is offered by the *CME v. the Czech Republic* case brought on the basis of the intra-EU BIT signed between the Czech Republic and the Netherlands in 1991.[25] This treaty establishes that a contracting party may propose to the other party consultations 'on any matter concerning the interpretation or application of the Agreement'.[26] The provision further enjoins the other contracting party to give 'sympathetic consideration' to the request and to afford 'adequate opportunity' for the consultation.[27] Pursuant to this provision, in *CME v. the Czech Republic*, the contracting parties adopted a 'common position', to which the tribunal referred in the final award.[28]

Another example is offered by the *Railroad Development v. Guatemala* dispute brought on the basis of the US-Dominican Republic-Central America FTA (US--DR-CAFTA).[29] Like CETA, this agreement allows a non-disputing contracting party to make oral and written submissions to a tribunal regarding the interpretation of the agreement.[30] In *Railroad Development v. Guatemala*, the tribunal had to decide on the content of fair and equitable treatment and the minimum standard of treatment, provided for in Article 10.5 of the US-DR--CAFTA. Three non-disputing contracting parties, the United States, El Salvador and Honduras, filed submissions on the matter arguing in favour of a restrictive interpretation of Article 10.5 of the US-DR-CAFTA.[31] While taking their submissions into account, the tribunal found that the minimum standard of treatment has evolved since the *Neer* formulation, and rejected the suggestion that it should be construed narrowly.[32]

Even outside the context of a dispute or after a dispute has been resolved, states can make their views known in order to influence future interpretations.[33] After the tribunal in *SGS v. Pakistan* had delivered its Decision on Objections to Jurisdiction,[34] the Swiss authorities addressed a letter to the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID) expressing their concern about the tribunal's interpretation of the investment treaty's umbrella clause in Article 11 of the applicable BIT. The Swiss authorities criticised the tribunal for not finding it necessary to enquire about the Swiss authorities' interpretation of Article 11 of the BIT, while Pakistan (the respondent) was indeed asked to provide its views. The Swiss authorities were particularly critical, especially since the tribunal had attached importance to the contracting parties' intentions.[35] The Swiss authorities further declared that they were 'alarmed' about the tribunal's interpretation of the treaty's umbrella clause, interpretation which run counter to Switzerland's intention when concluding the BIT.[36] The letter went on to explain the Swiss interpretation of the umbrella clause.[37] While this reaction in relation to *SGS v. Pakistan* does not reflect a state-state procedure, it could serve as guidance for future tribunals to invite the two contracting parties to

24 Article 8.44 of the CETA.

25 CME Czech Republic B.V. (The Netherlands) v the Czech Republic, UNCITRAL, Final Award, 14 March 2003, paras 87, 437.

26 Article 9 of the Czech Republic-Netherlands BIT.

27 *Ibid.*

28 CME Czech Republic B.V. (The Netherlands) v the Czech Republic, UNCITRAL, Final Award, 14 March 2003, paras 87, 437.

29 Railroad Development Corporation (RDC) v Guatemala, ICSID Case No ARB/07/23, Award, 29 June 2012.

30 Article 10.20(2) of the US-DR-CAFTA.

31 Railroad Development Corporation (RDC) v Guatemala, ICSID Case No ARB/07/23, Award, 29 June 2012, paras 207–211.

32 Lars Markert and Catharine Titi, States Strike Back – Old and New ways for Host States to Defend against Investment Arbitrations, in Andrea Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2013-2014*, 2015, OUP, p. 416.

33 Lars Markert and Catharine Titi, States Strike Back – Old and New ways for Host States to Defend against Investment Arbitrations, in Andrea Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2013-2014*, 2015, OUP, p. 417.

34 SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No ARB/01/13, Decision on Objection to Jurisdiction, 6 August 2003.

35 E.g. see the tribunal's statement on the need for '[c]lear and convincing evidence that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT' (SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No ARB/01/13, Decision on Objection to Jurisdiction, 6 August 2003, para. 167).

36 Note on the Interpretation of Article 11 of the BIT between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General dated 1 October 2003, cited in Emmanuel Gaillard, Investment treaty arbitration and jurisdiction over contract claims—the SGS cases considered' in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, 2005, p. 341–342.

37 *Ibid.*

express their views when determining their original intentions.[38]

2.4. Clarifications through diplomatic notes and periodic reviews of treaty content

An authentic interpretation must not constitute a treaty amendment. International investment agreements include specific provisions on amendment, which are beyond the scope of the present to explore. However, the two types of interpretive statements examined in this section are related to treaty amendment either because they borrow means that can also be used for treaty amendment (diplomatic notes) or because they can lead to treaty amendment (regular reviews of treaty content).

The exchange of diplomatic notes to amend or clarify the content of an investment treaty is common practice. The United States exchanged diplomatic notes with eight new EU member states (Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, Romania, Poland, and Slovakia) before their accession to the Union, in order to clarify some aspects of their respective treaties.[39] Through diplomatic notes to UK bilateral investment treaties the contracting parties agreed to extend the treaties' application to 'the Bailiwicks of Jersey and Guernsey and the Isle of Man'.[40] An often-discussed case concerns the exchange of diplomatic notes between Argentina and Panama to clarify the scope of the most-favoured-nation (MFN) clause in the Argentina--Panama BIT. Following the Decision on Jurisdiction in *Siemens v Argentina*,[41] in which the tribunal had allowed application of the MFN clause to the treaty's dispute settlement provisions, the contracting parties exchanged diplomatic notes which contained an 'interpretative declaration' to the effect that the BIT's MFN clause does not extend to dispute settlement clauses.[42] Subsequently, Argentina failed to unilaterally convince the tribunal in *National Grid v. Argentina*, that the interpretation adopted in the Argentina-Panama diplomatic notes should apply to the Argentina-UK BIT. The tribunal noted that Argentina had not adopted similar joint interpretations of the MFN clause in the more than 50 other bilateral investment treaties it has concluded with other states.[43] The tribunal further commented:

> 'While it is possible to conclude from the UK investment treaty practice *contemporaneous* with the conclusion of the Treaty that the UK understood the MFN clause to extend to dispute resolution, no definite conclusion can be reached regarding the Argentine Republic's position *at that time*. Therefore, the review of the treaty practice of the State parties to the Treaty with regard to their common intent is inconclusive.'[44]

Although it is standard UK treaty practice to render the MFN clause applicable to ISDS provisions,[45] *in casu* the tribunal's argument that the MFN clause was understood to apply to the treaty's dispute settlement clause *at the time* the treaty was concluded, is not relevant to the counterargument that that may have been contrary *subsequent* agreement or practice.

A final mechanism for joint treaty interpretations considered here is periodic review of treaty provisions by the parties, which is sometimes expressly included in investment treaties. Article 8.10, paragraph 3, of CETA establishes:

> 'The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.'

38 Lars Markert and Catharine Titi, States Strike Back – Old and New ways for Host States to Defend against Investment Arbitrations, in Andrea Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2013-2014*, 2015, OUP, p. 417.

39 See Lise Johnson and Merim Razbaeva, State Control over Interpretation of Investment Treaties, April 2014, http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf, p. 6.

40 See Investment Treaty Arbitration 2016: England and Wales – Overview of investment treaty programme, *Global Arbitration Review* http://globalarbitrationreview.com/jurisdiction/2000108/england-&-wales. For another example, see Exchange of Notes between the UK and Paraguay amending the 1981 UK-Uruguay BIT, http://www.sice.oas.org/Investment/BITSbyCountry/BITs/PAR_UK_1993.pdf.

41 Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

42 For an account, see National Grid v. Argentina, UNCITRAL, Decision on Jurisdiction of 20 June 2006, para. 85.

43 *Ibid*., para. 85.

44 *Ibid*., para. 85, emphasis added.

45 E.g. Article 3(3) of the UK Model BIT (2008), see also Article 11. See also, for instance, respective Articles 3(3) and 11 of the BITs between the UK and Azerbaijan, Barbados, Belarus, Bosnia and Herzegovina, Burundi, Côte d'Ivoire, Cuba, Ethiopia, Georgia, Honduras, Kazakhstan, Laos, Pakistan, Slovenia, South Africa, Tonga, Turkmenistan and Uganda, and respective Articles 3(4) and 10 UK-Chile BIT and UK-Lebanon BIT; see also Articles 3(3) and 10A UK-Paraguay BIT (1981) as amended by the Exchange of Notes upon a proposal by Paraguay. Contrast Article III(2) UK-Colombia BIT (2010), which in all appearances follows extensively Colombia's Model BIT.

This provision is complemented by Article 8.44, paragraph 3, of CETA which provides among others that the Committee on Services and Investment may, upon agreement of the contracting parties, 'recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation'. In addition, the Committee on Services and Investment may 'adopt and amend rules supplementing the applicable dispute settlement rules, and amend the applicable rules on transparency'.[46] The relevant subparagraph adds that such rules and amendments are binding on a tribunal established under CETA's section on 'Resolution of investment disputes between investors and states'.[47] Similar provisions exist in other EU international investment agreements.[48]

3. Filter mechanisms

The 'filter' to ISDS is a mechanism which allows contracting parties to intervene in investment dispute settlement that involves sensitive measures and to determine whether these have been taken for the stated reasons.[49] In reality, where a filter exists, it is up to the parties to decide whether a treaty exception applies. With filters the investor-state tribunal seised of a dispute where the contested issue arises may not proceed until the parties, the parties' financial, tax, etc. authorities, or a state-state tribunal have delivered their report or decision. The filter mechanism resembles provisions on joint interpretations by the parties, insomuch as the decision on a particular question is remitted to the parties. Seen in this light, filter mechanisms could be deemed to form a subcategory of joint interpretations. However, filters concern the concrete application rather than interpretation of a given rule. With filters, what is needed is not interpretation of a treaty provision *in abstracto*, such as in order to determine whether fair and equitable treatment is equated to the minimum standard of treatment, but determination of whether a particular exception or defence applies. For this reason, in contrast with joint interpretations, such as interpretations by the NAFTA FTC, that are binding on tribunals for all subsequent cases,[50] the determination of an issue according to a filter mechanism applies in principle only to the case at hand and cannot bind future tribunals.

Filters have been interpreted as forming part of states' endeavours to increasingly narrow the scope for arbitral review of host state policies.[51] The European Commission's 2014 Public consultation on modalities for investment protection and ISDS in TTIP referred to the filter mechanism in the following terms (limited to prudential measures):

> '[S]ome investment agreements have introduced mechanisms which grant the regulators of the Parties to the agreement the possibility to intervene (through a so-called *"filter" to ISDS*) in particular ISDS cases that involve measures ostensibly taken for prudential reasons. The mechanism enables the Parties to decide whether a measure is indeed taken for prudential reasons, and thus if the impact on the investor concerned is justified. On this basis, the Parties may therefore agree that a claim should not proceed.'[52]

NAFTA provides an early example of a filter mechanism. Article 1415 (*Investment Disputes in Financial Services*) provides:

> '1. Where an investor of another Party submits a claim […] and the disputing Party invokes Article 1410 [exceptions for prudential reasons], on request of the disputing Party, the Tribunal shall refer the matter in writing to the Committee for a decision. The Tribunal may not proceed pending receipt of a decision or report under this Article.
>
> 2. In a referral pursuant to paragraph 1, the Committee shall decide the issue of whether and to what extent Article 1410 [exceptions for prudential reasons] is a valid defense to the claim of the investor. The Committee shall transmit a copy of its decision to the Tribunal and to the Commission. The decision shall be binding on the Tribunal.
>
> 3. Where the Committee has not decided the issue within 60 days […], the disputing Party or the Party of

46 Article 8.44(3) of CETA.

47 *Ibid.*

48 E.g. see Article 9.30(2) of the EU-Singapore FTA.

49 This is how the term is used in the present. Filters are sometimes also understood to involve joint binding interpretations of the parties and procedures that aim to divert claims from investor-state dispute settlement, such as a requirement to exhaust local remedies. See Lise Johnson, Lisa Sachs, and Jesse Coleman, International Investment Agreements, 2014: A Review of Trends and New Approaches, in Andrea Bjorklund (ed.) *Yearbook on International Investment Law & Policy 2014-2015*, 2016, p. 44-47.

50 E.g. see Article 1131(2) of NAFTA ('*An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section*').

51 Lise Johnson, Lisa Sachs, and Jesse Coleman, International Investment Agreements, 2014: A Review of Trends and New Approaches, in Andrea Bjorklund (ed.) *Yearbook on International Investment Law & Policy 2014-2015*, 2016, p. 44.

52 See http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

> the disputing investor may request the establishment of an arbitral panel under Article 2008 (Request for an Arbitral Panel). The panel […] shall transmit its final report to the Committee and to the Tribunal. The report shall be binding on the Tribunal. […]'

A similar provision exists in the US Model BIT,[53] in the Canadian Model BIT,[54] and more recently a filter mechanism in relation to financial services measures was inserted in CETA. CETA's Chapter 13 on *Financial services* applies to investment in financial institutions in the territory of the host state. Article 13.16 provides an exception for prudential measures. It states that the agreement 'does not prevent a Party from adopting or maintaining reasonable measures for prudential reasons', including for the protection of investors, the maintenance of the safety, soundness, integrity, or financial responsibility of a financial institution, and ensuring the integrity and stability of a contracting party's financial system.[55] Article 13.21 states that a respondent may refer the matter to the Financial Services Committee for a determination of whether, and if so to what extent, the exception is 'a valid defence to the claim'.[56] In case of such a referral, the Financial Services Committee or the CETA Joint Committee, as the case may be, may jointly determine the issue. If a tribunal has been constituted, the committee shall transmit to it a copy of the joint determination. If the joint determination concludes that the exception is 'a valid defence to all parts of the claim in their entirety, the investor is deemed to have withdrawn its claim and the proceedings are discontinued'.[57] The joint determination that the exception is a valid defence to part of the claim will be binding on the tribunal.[58] Application of these provisions is further clarified in Annex 13-B (*Understanding on the application of art 13.16.1 and 13.21*). Similar provisions are included in other recent Canadian IIAs. CETA's filter mechanism for prudential measures has been described as 'a significant development of the filter mechanism found in NAFTA'.[59]

UNCTAD's *2015 World Investment Report* focused its definition of filters on a more specific type of provision. It equated the filter mechanism with an option found in the bilateral investment treaty between Canada and China of 2012.[60] The BIT in question contains a curious provision. According to this, where an investor files a claim to dispute settlement and the respondent invokes an exception for prudential measures, the tribunal must seek a 'report' from the contracting parties on this issue. The tribunal cannot proceed 'pending receipt of such a report or of a decision of a State-State arbitral tribunal, should such a State-State arbitral tribunal be established'.[61] Following this request for a report, the contracting parties' financial services authorities engage in consultations, which may end in a joint report that the prudential exception is a valid defence to the investor's claim. Such a joint report shall be binding on the investment tribunal.[62] So far, there is nothing astonishing about this provision. Its particularity is introduced immediately afterwards. In the case where the parties' financial services authorities fail to reach a joint decision on the issue of whether the prudential exception is a valid defence to the investor's claim:

> 'the issue shall, within 30 days, be referred by either of the Contracting Parties to a *State-State arbitral tribunal* […]. The decision of the State-State arbitral tribunal shall be transmitted to the investor-State tribunal, and shall be binding on the investor-State tribunal.'[63]

This *renvoi* to state-to-state arbitration is remarkable, especially given the phrasing of the provision and the questions it leaves open. The issue *shall* be referred to a state-to-state tribunal by one of the contracting parties, but what if the contracting parties do *not* refer the issue? Would in that case the investor-state tribunal not be able to deal with the case, or, after the lapse of 30 days of inaction, would it consider that it is able to claim the case back? Another particularity is that this provision goes beyond a mere state-to-state mechanism for the resolution of the issue and invites the initiation of state-to-state dispute settlement on the question of application of an exception. UNCTAD has viewed state-state dispute settlement as more suitable for 'sensitive issues of systemic importance, such as those relating to the integrity and stability of the financial system, the global

53 Article 20 of the US Model BIT (2012).
54 Article 23(3) of the Canadian Model BIT (version of 2012).
55 Article 13.16(1) of CETA.
56 Article 13.21(3) of CETA.
57 Article 13.21(4) of CETA.
58 Article 13.21(4) of CETA.
59 Andrew Lang and Caitlin Conyers, Financial Services in EU Trade Agreements, Study for the European Parliament, 2014, http://www.europarl.europa.eu/RegData/etudes/STUD/2014/536300/IPOL_STU(2014)536300_EN.pdf.
60 See UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 2015, New York and Geneva, UN, p. 149.
61 Article 20(2)(a) of the Canada-China BIT (2012).
62 Article 20(2)(b) of the Canada-China BIT (2012).
63 Article 20(2)(c) of the Canada-China BIT (2012), emphasis added.

system of international tax relations, or public health'.[64] Nonetheless, *investor*-state dispute settlement was introduced in order to depoliticise investment disputes,[65] and the provision in question encourages, essentially requires, the initiation of interstate arbitration.

Canada appears to have refined this type of filter since its 2012 BIT with China. Although in its newer treaties the issue is still to be submitted to state-state dispute settlement, provision is made in case that no decision shall be made. According to the 2016 Canada-Hong Kong BIT, at the request of a contracting party, where an investor submits a claim to arbitration and the respondent invokes certain treaty exceptions, the tribunal shall request a report from the parties 'on the issue of whether and to what extent the invoked paragraph is a valid defence to the claim of the investor'.[66] The tribunal cannot proceed, while receipt of this report is pending.[67] In the event that the parties cannot agree, they shall submit the issue to interstate arbitration, and the interstate tribunal shall prepare the report. The latter will be binding on the investor-state tribunal.[68] If no request for the constitution of an interstate tribunal has been made and no report has been received by the investor-state tribunal within 70 days of the referral, the investor-state tribunal may decide the matter.[69] Similar procedures are included in other recent Canadian BITs.[70]

Filter mechanisms are also common for taxation measures. The Canadian Model BIT (version of 2012) provides:

> '[…] An investor may not make a claim under paragraph 5 unless […] six months after receiving notification of the claim by the investor, the taxation authorities of the Parties fail to reach a joint determination that, in the case of subparagraph 5(a), the measure does not contravene that agreement, or in the case of subparagraph 5(b), the measure in question is not an expropriation.
>
> If, in connection with a claim by an investor of a Party or a dispute between the Parties, an issue arises as to whether a measure of a Party is a taxation measure, a Party may refer the issue to the taxation authorities of the Parties. A decision of the taxation authorities shall bind a Tribunal formed pursuant to Section C (Settlement of Disputes between an Investor and the Host Party) or arbitral panel formed pursuant to Section D (State-to-State Dispute Settlement Procedures). A Tribunal or arbitral panel seized of a claim or a dispute in which the issue arises may not proceed until it receives the decision of the taxation authorities. If the taxation authorities have not decided the issue within six months of the referral, the Tribunal or arbitral panel shall decide the issue. […]'[71]

Similar provisions exist in the US Model BIT,[72] in CETA,[73] and in a number of other recent IIAs.[74] It would also be possible to provide a filter mechanism with respect to other exceptions. The Korea-Vietnam FTA provides that '[i]f the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I or II,[75] the Tribunal shall, upon request of that disputing Party, request the Joint Committee to interpret the issue.'[76] If after 60 days the Joint Committee has failed to produce an interpretation, the issue shall revert to the tribunal for determination.[77]

4. Dispute prevention: Focal points or ombudsmen

Dispute prevention policies (DPPs) aim to minimise the number of conflicts that escalate into formal disputes.[78] Dispute prevention can require the establishment of

64 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 2015, New York and Geneva, UN, p. 149.

65 Catharine Titi, Are Investment Tribunals Adjudicating Political Disputes? Some reflections on the repoliticization of investment disputes and (new) forms of diplomatic protection, *Journal of International Arbitration* 32 (3), 2015, p. 263, with citations.

66 Article 22(3) of the Canada-Hong Kong BIT (2016).

67 Article 22(3) of the Canada-Hong Kong BIT (2016).

68 Article 22(4) of the Canada-Hong Kong BIT (2016).

69 Article 22(5) of the Canada-Hong Kong BIT (2016).

70 E.g. Article 22(3) of the Canada-Côte d'Ivoire BIT (2015); Article 24(3) of the Burkina Faso-Canada BIT (2015); Article 23(3) of the Canada-Guinea BIT (2015); Article 22(3) of the Canada-Mongolia BIT (2016).

71 Article 14(6) and (7) of the Canadian Model BIT (version of 2012).

72 Article 21 of the US Model BIT (2012).

73 Article 28.7(7) of CETA.

74 E.g. Article 22 of the Japan-Kazakhstan BIT (2014); Article 25 of the Japan-Uruguay BIT (2015); Article 14 of the Burkina Faso-Canada BIT; Article 14 of the Canada-Hong Kong BIT; Article 21 of the Canada-Mongolia BIT.

75 It has not been possible to identify Annex I and II of the Korea-Vietnam FTA to identify the exceptions to which this provision makes reference. Chapters contain annexes numbered with Arabic (rather than Latin) numerals, e.g. at the end of the FTA's investment chapter (Chapter 9) annexes are numbered in the following manner: Annex 9-A, Annex 9-B, etc.

76 Art 9.24(2) of the Korea-Vietnam FTA.

77 Art 9.24(2) of the Korea-Vietnam FTA.

78 UNCTAD, Investor–State Disputes: Prevention and Alternatives to Arbitration, UNCTAD Series on International Investment

institutional structures,[79] it can be pursued unilaterally but also bilaterally, and it can involve cooperation between the contracting parties. The present section explores a particular dispute prevention method that has been inserted in the new Brazilian cooperation and facilitation investment agreements (CFIAs), ombudsmen or focal points.[80]

The Brazilian government, averse to investor-state arbitration, has focused on DPPs and alternative dispute resolution (ADR).[81] The Brazilian model favours mechanisms that aim to prevent disputes on the basis of dialogue and bilateral consultation; if these fail, the parties can submit the dispute to state-state arbitration.[82] Initially, dispute prevention was one of the model's three pillars.[83] In its current form, Part III of the model is dedicated to 'Institutional Governance and Dispute Prevention'. Article 22 is entirely focused on dispute prevention. Dispute prevention is made possible through two institutions: a joint committee and national focal points or ombudsmen.

National focal points are designated by each party.[84] In Brazil, they are established within the Chamber of Foreign Trade (CAMEX),[85] the Council of Ministers of the Brazilian Chamber of Commerce, an inter-ministerial body for foreign trade, presided by the Minister of Development, Industry and Foreign Trade.[86] Their main task is to assist investors from the other party in their territory.[87] Their role is then one of dispute prevention as it is one of investment promotion and facilitation. Concretely, their responsibilities include: endeavouring to follow the recommendations of the Joint Committee and interact with their counterpart in the other contracting party; following up on requests and enquiries of the other party or of investors of the other party with the competent authorities; assessing, in consultation with relevant public authorities, suggestions and complaints of the other party or investors of the other party and recommending actions to improve the investment environment; seeking to prevent disputes in investment matters, in collaboration with public authorities and relevant private entities; and providing information on regulatory issues.[88] The contracting parties shall use the focal points, and the Joint Committee, to exchange information on business opportunities, procedures and requirements for investment.[89] The focal points 'shall promptly reply to notifications and requests' by the other party or its investors,[90] and they 'shall act in coordination with each other and with the Joint Committee in order to prevent, manage and resolve any disputes between the Parties'.[91] Although the model CFIA provides for state-state dispute settlement,[92] this does not become available until the dispute has become 'the object of consultations and negotiations between the Parties' and has been examined by the Joint Committee.[93] The exact role of the focal points is not entirely clear in this description but in the procedure that follows the Joint Committee has the leading role.[94]

The Brazilian model's national focal points or ombudsmen are inspired by the Korean Office of the Foreign Investment Ombudsman. The Foreign Investment Ombudsman was first introduced in 1999 to resolve grievances of foreign investors operating in Korea.[95] The Office of the Foreign Investment Ombudsman collects information about the problems experienced by foreign investors, it liaises with relevant administrative agencies, it proposes policies to improve investment promotion and assist foreign investors in 'solving their grievances'.[96] Besides Korea's investment ombudsman system, other countries have established investment ombudsmen, including Georgia,[97] Greece,[98] Japan,[99] the Philippines,[100]

Policies for Development, 2010, New York, Geneva, UN, p. xiv.

79 *Ibid.*, p. xiv.

80 The terms 'ombudsman' and 'focal point' are used interchangeably in the article as synonymous.

81 The term ADR is used here to signify 'alternative to ISDS'. See in general on this issue Catharine Titi, International Investment Law and the Protection of Foreign Investment in Brazil, *Transnational Dispute Management* 2, 2016, Special Issue on Latin America vol. 1 (eds Ignacio Torterola and Quinn Smith).

82 *Ibid.*, p. 9.

83 *Ibid.*, p. 9.

84 Article 17(1) of the Brazilian Model CFIA of 3 March 2016 (version 2.3.1) (hereinafter Brazilian Model CFIA).

85 Article 17(2) of the Brazilian Model CFIA.

86 CAMEX's functions are established by Decree n. 4.732/2003.

87 Article 17(1) of the Brazilian Model CFIA.

88 Article 17(4) of the Brazilian Model CFIA.

89 Article 18(1) of the Brazilian Model CFIA.

90 Article 17(6) of the Brazilian Model CFIA.

91 Article 22(1) of the Brazilian Model CFIA.

92 Article 23 of the Brazilian Model CFIA. See further e.g. Article 15 of the Brazil-Mozambique CFIA; Article 15 the Brazil-Angola CFIA; Article 13(6) of the Brazil-Malawi CFIA.

93 Article 22(2) of the Brazilian Model CFIA.

94 Especially Article 22(3) of the Brazilian Model CFIA.

95 See http://ombudsman.kotra.or.kr/eng/au/poelb.do.

96 See http://ombudsman.kotra.or.kr/eng/au/poelb.do.

97 See http://businessombudsman.ge/en.

98 See http://www.enterprisegreece.gov.gr/en/about-us-/profile.

99 See http://www.invest-japan.go.jp/contact/en_index.html.

100 See http://www.ombudsman.gov.ph/docs/investmentOmbudsman/investmentomb.pdf.

and the United States.[101] These systems are generally to be distinguished from the focal points in the Brazilian model inasmuch as they are mechanisms established unilaterally by a country without reciprocity. At the same time, these mechanisms do not *replace* investor-state dispute settlement but are complementary to it.

The Brazilian model's national focal points are redolent of another mechanism, the national contact points (NCPs) for the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD). The OECD Guidelines for Multinational Enterprises contain recommendations for responsible business conduct that adhering governments encourage their enterprises to respect wherever they operate.[102] The national contact points are agencies established by the governments to facilitate implementation of the OECD Guidelines, and provide a mediation and conciliation platform for resolving related practical issues.[103] They are not established to protect or assist investors but to ensure that the latter observe the OECD Guidelines.

CETA has also set in place contact points, whose role is different yet. CETA contact points are established under Article 26.5. According to this article, their task comprises, among others, monitoring the work of CETA's institutional bodies, following up on the decisions made by the CETA Joint Committee, and facilitating communications between the contracting parties on any matter covered by the agreement.[104]

5. Conclusion

State-state procedures in investment dispute settlement and dispute prevention continue to attract attention. This short contribution has examined three specific 'soft' or non-adjudicatory state-to-state procedures in dispute prevention and dispute resolution. The article discussed interpretive statements issued jointly by the contracting parties and noted that general public international law recognises subsequent agreement or practice of the contracting parties as an authoritative means of treaty interpretation. Joint treaty interpretations are also possible on the basis of treaty articles that expressly establish procedures for binding interpretive statements, such as Article 1131 of NAFTA, but also on the basis of other means, such as through joint submissions in an ongoing dispute. The article also briefly considered clarifications through diplomatic notes and periodic review of treaty content. Subsequently, the discussion turned to filter mechanisms, that allow the relevant tax or financial authorities or the parties to determine jointly whether a contested measure falls within the scope of a defence that the respondent invokes. Filters appear to increase in popularity and have been refined in recent investment treatymaking. Finally, focal points or ombudsmen were considered on the basis of the Brazilian Model CFIA. Focal points or ombudsmen can function as an effective dispute prevention – but also investment promotion and facilitation – mechanism. A challenge that remains with respect to Brazilian CFIAs is that at the moment of writing these treaties have not yet been ratified.[105] The mechanism however is interesting and could be emulated in other investment treaties. But caution is also necessary. The mechanisms canvassed in this article entail, by definition, a partial politicisation of investment disputes. Such politicisation may be more obvious when the state parties have a direct involvement in a dispute, such as in the case of joint interpretive statements or in the case of filter mechanisms that route the dispute to state-state arbitration. But it is also present in other contexts. Notice for instance that the Brazilian model CFIA's focal points are established within CAMEX, itself a political body. This does not mean that the proposed mechanisms are not appropriate, but rather that a critical approach vis-à-vis their role and functioning and further study are necessary going forward.

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